

FEB 12 1987

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In The
Supreme Court of the United States

October Term, 1986

IN RE FLIGHT TRANSPORTATION
CORPORATION SECURITIES LITIGATION

SUBCLASS IV (UNITHOLDERS),

Petitioners,

vs.

FOX AND COMPANY,
REAVIS & MCGRATH, ET AL,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

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Introduction

This Supplemental Brief is filed by Harris Trust and Savings Bank ("Harris Bank"), a member of Subclass IV, Petitioners herein, pursuant to Supreme Court Rule 22.6.¹ After the named class representatives of Subclass IV filed a Petition for Writ of Certiorari with this Court on October 29, 1986, intervening matters indicate

¹ Supreme Court Rule 22.6 provides in relevant part that any party "... may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new

(Footnote continued on the following page)

that Harris Bank may no longer be adequately represented in this appeal. Accordingly, Harris Bank seeks to advise the Court of its interest in this appeal and inform the Court that it objects to any proposal to voluntarily withdraw or dismiss the pending Petition for Writ of Certiorari heretofore filed by the representatives of Subclass IV.²

I. HARRIS BANK, A MEMBER OF SUBCLASS IV, OBJECTS TO ANY VOLUNTARY DISMISSAL OF THESE PROCEEDINGS.

On October 29, 1986, the representatives of Subclass IV filed a Petition for Writ of Certiorari which seeks this Court's review of the adequacy, fairness and reasonableness of certain settlement agreements approved by the United States Court of Appeals for the Eighth Circuit, which impose indemnity and legal defense obligations upon absent plaintiff class members without adequate notice and an opportunity to be heard. The settlement agreements obligate the plaintiff class members to indemnify and hold harmless the settling defendants against any judgment that may be obtained against them arising out of matters which formed the basis of the litigation below. The imposition of unlimited and unascertainable liability

¹ (Continued)

cases or legislation or other intervening matter not available at the time of the party's last filing . . . " Harris Bank, a member of Subclass IV, Petitioners herein, is a party to these proceedings and has a significant stake in the outcome of this appeal. *See, e.g., Norman v. McKee*, 431 F.2d 769, 774 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971).

² Throughout this Supplemental Brief, the following abbreviations will be used: (i) "App." refers to the Appendix submitted by the representatives of Subclass IV with the Petition for Writ of Certiorari filed on October 29, 1986; (ii) "R" refers to the record on appeal in the United States Court of Appeals for the Eighth Circuit; (iii) "Tr." refers to the transcript of proceedings before the District Court of Minnesota, or before the United States Court of Appeals for the Eighth Circuit; and (iv) "Pet." refers to the Petition for Writ of Certiorari filed October 29, 1986 by the representatives of Subclass IV.

upon absent class members raises significant issues concerning the due process rights of absent class members which warrant this Court's review.

A. Harris Bank Is A Member Of Subclass IV And Subclass III And Participated In Prior Proceedings Through The Actions Of Its Named Class Representatives.

Harris Bank, a state chartered commercial bank and trust company, with offices in Chicago, Illinois, is a member of Subclass IV and Subclass III in these class action proceedings. Harris Bank is a member of Subclass IV, as Trustee of the Convertible Fund of Trust for the Collective Investment of Employee Benefit Accounts ("Convertible Fund"), which fund holds 1,500 units of Flight Transportation Corporation ("FTC") \$ 25,000,000, 11-1/4% Sinking Fund Debentures due June 1, 1995 with warrants ("Debenture Units"). These 1,500 units constitute six (6) percent of the entire issue. Harris Bank is a member of Subclass III, as Trustee of the Special Capital Fund for Collective Investment of Employee Benefit Accounts ("Special Capital Fund") and Trustee of the Common Trust Fund H ("Common Trust Fund"), which funds hold 64,000 shares of FTC common stock comprising approximately ten (10) percent of the 1982 stock offering. Harris Bank does not have a personal, financial interest in the FTC Debenture Units or common stock. Harris Bank's interest is solely as Trustee of the foregoing funds. As a member of Subclass IV and Subclass III, Harris Bank is bound by the terms and conditions of the settlement agreements approved by the United States Court of Appeals for the Eighth Circuit. H. Newberg, *Newberg On Class Actions*, §16.20 (2d Ed. 1985). In the event a claim were made by the settling defendants for indemnification, Harris Bank, in its individual capacity, may be required to indemnify and hold harmless such settling defendants against any judgment which might be obtained, despite the fact that Harris Bank itself has received no benefit from any prior distributions and is effectively unable to obtain reimbursement from those who did receive such benefits.

To date, Harris Bank has not been an active participant in

this litigation and has instead relied upon the representatives of Subclass IV and Subclass III to protect its interests. In the proceedings before the district court, Harris Bank, through its Subclass IV representatives, objected to the settlement agreements which contain provisions obligating the plaintiffs to indemnify the defendants. (Pet. 9). Likewise, after the district court approved the settlement agreements over the objections of the Subclass IV representatives, Harris Bank, through its Subclass IV representatives, appealed to the Court of Appeals for the Eighth Circuit. (App. A1-A2). Finally, when the Court of Appeals approved the settlement agreements over the objections of Subclass IV, and subsequently denied a Petition for Rehearing *en banc*, Harris Bank, through its Subclass IV representatives, filed the pending Petition for Writ of Certiorari in this Court on October 29, 1986. Since the filing of the Petition, however, intervening matters indicate that its Subclass IV representatives may no longer adequately represent Harris Bank's interests and prosecute this appeal.

B. Since The Filing Of The Petition For Writ Of Certiorari On Behalf Of Subclass IV, Intervening Matters Have Occurred Which Indicate The Representatives Of Subclass IV May Attempt To Voluntarily Dismiss The Pending Petition For Writ Of Certiorari.

After the representatives of Subclass IV filed the Petition for Writ of Certiorari in this Court challenging the settlement agreements at issue herein, they entered into another settlement over the objection of Harris Bank. This recent settlement was in the form of an amendment to the initial settlement in these proceedings ("the Sharing Agreement"). The proposed amendment arguably resolves certain disputes concerning final allocations under the Sharing Agreement. One of the terms and conditions of the amendment, however, is that upon "final approval" of the amendment, the Subclass IV representatives shall dismiss the pending Petition for Writ of Certiorari. Harris Bank objected to this provision. A hearing was held before the district court on December 15, 1986 concerning the amendment. Counsel for Harris Bank appeared at such hearing and strenuously objected to the amend-

ment on the grounds that this Court should not be precluded from the opportunity to decide the Petition for Writ of Certiorari on its merits. (Tr., district court: December 15, 1986 at 4). Despite these objections, the district court approved the amendment.³

In accordance with the terms of this amendment, the representatives of Subclass IV may seek to voluntarily dismiss the pending Petition for Writ of Certiorari. Harris Bank, however, objects to any voluntary dismissal of the pending Petition for Writ of Certiorari. The Petition for Writ of Certiorari has merit, particularly with respect to the situation of Harris Bank, and this Court should be allowed to act upon it. If the Petition for Writ of Certiorari is withdrawn over its objections, Harris Bank will be improperly precluded from seeking this Court's review of the constitutionality of requiring each innocent member of Subclass IV, without prior notice or hearing, to indemnify the settling defendants against any liability related to the issuance of FTC securities, thereby effectively bearing the defendants' risks. If the Petition for Writ of Certiorari is allowed, then the Supreme Court should not be precluded by interim actions, taken over the objections of Harris Bank, from fully reviewing the prior settlements and issuing an opinion on the merits.

³ On January 14, 1987 Harris Bank filed a timely notice of appeal to the United States Court of Appeals for the Eighth Circuit concerning the district court's approval of the amendment to the Sharing Agreement.

C. If The Subclass IV Representatives Voluntarily Dismiss The Pending Petition For Writ Of Certiorari, Harris Bank Will No Longer Be Fairly And Adequately Represented.

If the representatives of Subclass IV are unwilling to proceed with the pending Petition for Writ of Certiorari, Harris Bank should alternatively be granted leave to substitute as petitioner and prosecute the pending Petition for Writ of Certiorari, or be granted leave to file its own Petition for Writ of Certiorari with this Court, or be granted leave to intervene in these proceedings. This Court may conclude, as a matter of law, that Harris Bank's interests are not adequately represented where, as in this case, the class representatives have for the first time indicated their unwillingness to seek further review of an erroneous district court order. *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985), *cert. denied.*, ___ U.S. ___, 106 S.Ct. 3337, 92 L.Ed.2d 742 (1986); *Burkhalter v. Montgomery Ward and Co.*, 676 F.2d 291, 294 (8th Cir. 1982).

As a practical matter, the apparent unwillingness of Subclass IV's representatives to go forward with this appeal places Harris Bank in a procedural quandary. There is no question that Harris Bank is bound by the terms of the settlement agreements and would be subject to the indemnification provisions contained therein. *Hansberry v. Lee*, 311 U.S. 32, 43 (1940); H. Newberg, *Newberg On Class Actions*, §16.20 (2d Ed. 1985). However, if the representatives of Subclass IV are permitted to voluntarily dismiss this appeal, Harris Bank will have no alternative means of preserving its objections because the ninety day jurisdictional time period within which Harris Bank could have filed its own timely Petition for Writ of Certiorari in this Court has elapsed. *See, e.g.*, S.Ct.R. 12. Certainly the decision to appeal does not rest solely with Harris Bank's named class representatives. *See, e.g.*, *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1177-78 (5th Cir. 1978), *cert. denied.*, 439 U.S. 1115 (1979). Moreover, absent class members do not waive appellate review merely because they failed to take affirmative action when their interests were at one time adequately represented. *In re General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106, 1121 (7th Cir.),

cert. denied, 444 U.S. 870 (1979). Harris Bank has not sought leave to intervene in any of the prior proceedings or filed its own notice of appeal because in prior proceedings its interests were adequately protected by the representatives of Subclass IV.

If Harris Bank is not alternatively substituted as petitioner, or granted leave to file its own Petition for Writ of Certiorari in these proceedings, or granted leave to intervene to prosecute the pending Petition for Writ of Certiorari, Harris Bank will be seriously prejudiced. As a practical matter, if a claim were ever made for indemnification by any of the settling defendants, Harris Bank would be the real party at risk, even though Harris Bank has received and will receive no personal benefit whatsoever from any of the settlements. In that event, Harris Bank would not be permitted to charge any of the funds for any of the allowed defense or indemnification costs. Rather, Harris Bank's only recourse would be to, in turn, seek indemnification from the hundreds of individual pension and profit sharing plans and trusts to which it paid the distributed amounts in good faith. This would not be realistically feasible. For example, some participating plans have been terminated or have made unrecalable lump sum distributions. Most, if not all, have experienced significant turnover of individual participants since the distribution was made. There have been comparable changes in the trust accounts which participate in the Common Trust Fund. The unknown level of risk to which Harris Bank would be exposed by imposition of the indemnification provisions on an *ex post facto* basis, were those provisions to remain in effect, makes it essential to Harris Bank that the pending Petition for Writ of Certiorari filed by its Subclass IV representatives be reviewed by this Court on the merits.

II. THE PETITION FOR WRIT OF CERTIORARI HAS MERIT AND SHOULD BE GRANTED BY THIS COURT.

A. The Decision Of The Eighth Circuit Conflicts With Decisions Of This Court And Other Circuit Courts Of Appeals.

In essence, the decision of the Eighth Circuit approves the imposition of financial obligations upon absent class members without adequate notice and an opportunity to be heard. This result is in direct conflict with this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), where this Court held that, if a court approves a settlement agreement which binds an absent class plaintiff concerning a claim for money damages, due process of law requires that the absent class member must receive adequate notice and an opportunity to be heard and participate in the litigation. *Id.* at 804.

In this case, the initial class action notice sent to absent class members made no reference, direct or indirect, to the possibility that class members could have any financial obligations imposed upon them should they elect to remain in the class. In fact, the notice expressly stated to the contrary and provided that, "Remaining class members will not subject you to any out-of-pocket costs or fees." (App. H1). The Eighth Circuit's approval of the financial obligations imposed upon the absent class members, who were never served with process and who were without prior notice that such obligations could be imposed, is a drastic deprivation of due process of law which deserves this Court's attention.

Similarly, the Eighth Circuit's approval of the district court's ultimatum that Subclass IV either accept the settlements in question or renounce all prior settlements and go to trial against all remaining defendants is the type of coercion specifically disapproved of by this Court in *Evans v. Jeff D.*, ___ U.S. ___, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986), and other Circuit Courts of Appeals. See *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *In re General Motors Corp. Engine Interchange Lit.*, 594 F.2d 1106, 1124 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979).

The Eighth Circuit reasoned that the district court did not coerce Subclass IV into accepting the settlements because it gave Subclass IV the option of going to trial provided that Subclass IV return the approximately \$11,000,000 previously distributed to its members and give up their claims under the Sharing Agreement. (App. A8-A9). This option, however, was only illusory as respects Harris Bank. Refunding was not a viable option because those funds were the product of Court approved settlements with other defendants, and refunding would have required Subclass IV to cancel and thereby breach earlier settlement agreements. Moreover, it was realistically impossible for Harris Bank to reclaim the distribution that it had already in good faith redistributed to the hundreds of holders of the Liquidating Accounts and which had in turn been reallocated to the accounts of thousands of individual participants and beneficiaries.⁴

B. The Decision Below Calls For The Exercise Of This Court's Supervisory Powers.

In the proceedings below, neither the district court nor the United States Court of Appeals for the Eighth Circuit cited any authority in support of the proposition that a federal court has the power to impose financial obligations upon absent class members without prior notice that, if they remain in the class, they may be exposing themselves to liabilities. (App. A1-A9; C1-C7). If the opinion of the Eighth Circuit stands, notices in all future class

⁴In rendering its opinion, the Eighth Circuit took some comfort in concluding that the possibility that the indemnity provisions would be invoked was at best remote. (App. A5). The record, however, contains no factual information to support this conclusion. To the contrary, counsel for defendant Fox and Company admitted in oral argument before the Eighth Circuit that the indemnities had substantial value to his client, thus implying that the risk of liability was, and is, real. (Tr., United States Court of Appeals for the Eighth Circuit: May 14, 1986 at 38-42). Finally, whether the obligations resulting from the indemnity provisions are remote, or not, is irrelevant. There simply is no authority for the proposition that unlimited financial obligations, remote or otherwise, can be imposed upon absent class members without adequate notice and an opportunity to be heard.

actions will have to disclose clearly to potential class members that, if they do not opt out, they may be placing their own assets in jeopardy, because eventual settlements approved by the court, even over the objection of the class representative, may make the class members unlimited insurers of the defendants' risks. The imposition of unlimited and unascertainable liabilities upon absent class members raises serious questions regarding the viability of the class action device which warrants the exercise of this Court's supervisory powers in these proceedings.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari filed by the representatives of Subclass IV on October 29, 1986 should be granted. In the event that the Subclass IV representatives attempt to voluntarily dismiss the Petition prior to this Court's consideration of the Petition on the merits, Harris Bank should be substituted as petitioner to prosecute the pending Petition for Writ of Certiorari filed on behalf of Subclass IV, or be granted leave of Court to file its own Petition for Writ of Certiorari, or be granted leave to intervene in these proceedings.

Respectfully submitted,

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